

**§ 84.15 Guidance on 18 U.S.C. 208.**

(a) *Conflicts and appearance of conflicts under 18 U.S.C. 208.* See 5 CFR part 2635, subpart D and subpart E, OGE opinions (which are available for purchase from the U.S. Office of Government Ethics, 1201 New York Avenue, NW., suite 500, Washington, DC 20005-3917), and 5 CFR 3601.105 for provisions on conflicts of interest under 18 U.S.C. 208.

(b) *Applicability to enlistees.* The provisions of 18 U.S.C. 208 and related provisions of OGE regulations do not apply to enlisted members. However, provisions similar to 18 U.S.C. 208 do apply to enlisted members as follows: [The following is a General Order] except as approved by the DoD component DAEO or designee, an enlisted member, including an enlisted special Government employee, shall not participate personally and substantially as part of his official DoD duties, in any particular matter in which he, his spouse, minor child, partner, entity in which he is serving as officer, director, trustee, partner or employee or any entity with which he is negotiating or has an arrangement concerning prospective employment, has a financial interest [end of General Order].

(c) *Waiver of 18 U.S.C. 208(a).* Pursuant to 18 U.S.C. 208(b), application of 18 U.S.C. 208(a) may be waived.

(1) The regulatory waivers for DoD under 18 U.S.C. 208(b)(2) have been preserved and are reprinted as follows (see 5 CFR 2635.402(d));

(i) For civilian DoD components, such waivers appear in Appendix B to this part;

(ii) For the Department of the Army, such waivers appear in Appendix B to this part;

(iii) For the Department of the Air Force, such waivers appear in Appendix B to this part;

(iv) For the Department of the Navy, such waivers appear in Appendix B to this part.

(2) Application of 18 U.S.C. 208(a) may be waived for individuals when a financial interest is not so substantial as to be likely to affect the integrity of the services that the Federal Government may expect from the DoD employee. Considerations in determining whether the interest is not so substantial as to

be deemed likely to affect the integrity of the services that the Federal Government may expect from the DoD employee include:

(i) The extent to which the DoD employee's exercise of authority and responsibility can affect his interest;

(ii) The relative importance of the interest in the DoD employee's life or finances;

(iii) The potential for harm to the Federal Government and to the DoD employee if the DoD employee's interests influence his decision-making;

(iv) How the situation would appear to an informed public;

(v) The nature of the relationship between the DoD employee and the individual who has the interest concerned.

(3) In order to pursue an individual waiver under 18 U.S.C. 208(b)(1) the following steps are mandatory:

(i) Before a waiver is requested, consideration should first be given to alternative resolutions, such as disqualification, divestiture, reassignment, or rearrangement of duties. Individual waivers are to be considered only when all alternatives have been exhausted. The supervisor should also consider, with the advice of the Ethics Counselor, whether a potential violation of 18 U.S.C. 208(a) exists. See paragraph (d) of this section. Even if the interests are insubstantial, consideration should be given to whether the particular matter will have a direct and predictable effect on the financial interest. See 5 CFR 2635.402(b)(1);

(ii) A request for a waiver shall be forwarded through the chain of command or supervision to the DoD component DAEO. The DoD component DAEO shall consult, if practicable, on the action with OGE;

(iii) Pending the approval of the waiver, the DoD employee shall be disqualified from participation in the particular matter that will have an effect on the financial interest;

(iv) The waiver request shall include the Ethics Counselor's findings of fact on the following:

(A) The manner in which the financial interest was acquired;

(B) The purpose behind the DoD employee's acquisition of the interest;

(C) The dollar value of the interest;

(D) The potential amount by which the DoD employee's official actions may affect the financial interest;

(E) The degree to which the DoD employee has control over official actions which may affect the non-Federal entity;

(F) The size of the non-Federal entity and the degree to which official actions may affect the non-Federal entity;

(G) The value of the financial interest in relation to the DoD employee's net worth and income from other sources;

(H) The degree to which the DoD employee has control over the financial interest, and whether it is capable of being divested.

(4) By statute, authority to grant 18 U.S.C. 208(b)(1) waivers rests with the DoD official responsible for the DoD employee's appointment. By Executive Order 12674, that authority shall not be exercised without prior consultation, if practicable, with OGE. The DoD component DAEO shall consult with OGE regarding the waiver on behalf of the DoD official responsible for the DoD employee's appointment.

(d) *Resolution of conflicts.* Resolution of actual or apparent conflicts of interest is the responsibility of the head of the DoD component command or organization. An Ethics Counselor should be consulted about alternatives for resolution. See subpart J of this part for enforcement information.

#### § 84.16 Other conflict of interest laws.

(a) *Bribery and graft.* (1) [The following is a General Order] All DoD employees are prohibited from, directly or indirectly, giving, offering, promising, demanding, seeking, receiving, accepting, or agreeing to receive anything of value to influence any official act, to influence commission of fraud on the United States, to induce committing or omitting any act in violation of a lawful duty, or to influence testimony given before an individual or non-Federal entity authorized to hear evidence or take testimony [end of General Order]. See 18 U.S.C. 201(b).

(2) [The following is a General Order] DoD employees are also prohibited, except as provided by law for the proper discharge of official duties, from, directly or indirectly, giving, offering,

promising, demanding, seeking, receiving, accepting, or agreeing to accept anything of value for or because of any official act performed or to be performed, or for or because of any testimony given or to be given before an individual or non-Federal entity authorized to hear evidence or take testimony [end of General Order]. See 18 U.S.C. 201(c).

(3) These prohibitions do not apply to the payment or receipt of witness fees authorized by law, certain travel and subsistence expenses to appear as a witness and value of time lost in attendance at a trial, hearing, or proceeding. Other prohibitions may apply. See 18 U.S.C. 201(d); 5 U.S.C. 5515 and 5751 and paragraph 66 of part IV, MCM, 1984 (10 U.S.C. 801–940).

(b) *Compensation related to matters pending Government decision.* OGE interpretation of prohibitions under 18 U.S.C. 203 appear in 5 CFR 2635.801(d)(3). These prohibitions do not apply to enlisted members. A DoD employee whose salary is not tied to the profitability of the non-Federal entity's Federal Government contracts does not violate this statute. See OGE opinion 86x9<sup>18</sup> (informal). This statute prohibits receiving compensation for any representation, including those where there is no intent to be corrupted or to provide preferential treatment. Representations can be either oral or written.

(1) The prohibition does not apply to a DoD employee's representation of himself, but this exception does not extend to the representation of a distinct, legal, non-Federal entity as a corporation, a partnership, or even a sole proprietorship. 18 U.S.C. 203(a)(2) prohibits an offer or payment of compensation, the solicitation or receipt of which is otherwise barred.

(2) The prohibitions apply to special Government employees but only in relation to a particular matter involving a specific party or parties in which the special Government employee participated personally and substantially or, absent such participation, if he served

<sup>18</sup>Copies are available from Office of Government Ethics, 1201 New York Avenue NW., Suite 500, Washington, DC 20005–3917.